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JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, appellant,
v.
THE UNITED STATES. } No. 187.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE APPELLEES.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, appellant,
v.
THE UNITED STATES. } No. 187.

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BRIEF FOR THE APPELLEES.

It seems unnecessary to write an extended brief in this case, reference being made to brief for appellees in No. 186.

It is pretended that this case differs from No. 186, because in the present case the granting act contained the following: "That the Commissioner of the General Land Office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed."

There is nothing to show that they were not surveyed with all convenient speed. There is nothing to show, if that were material, that the company desired to have them surveyed, except the allegation (which we suppose is technically admitted) made in the plea in this case (Record, p. 16) that the company has "continuously demanded the survey and patenting thereof at all times since the railroad from Portland to McMinnville was accepted as aforesaid, and would have selected the same, as this defendant did, as soon as surveyed."

"Thereof" refers to the particular tract involved in the suit, and not to the lands generally or any particular part of them other than that tract.

What this allegation really refers to, unless it is to a mere effort to select prior to survey, is not clear. There is nothing to show that this demand or effort was accompanied by payment into the Treasury of "the cost of surveying, selecting, and conveying the same." Act of July 31, 1876 (19 Stat., 121.)

But this court takes notice of the difference between a suit by the United States essentially for the benefit of a homesteader or preemptioner and a suit by the United States essentially for its own benefit. (See *United States* v. *Beebe*, 127 U. S., 338.)

Doing so, the court considers whether the party substantially interested has or has not been guilty of laches, rather than whether the nominal party has or has not been.

If we concede that there should have been an earlier survey, this was certainly not the fault of the individual claimant, who could no more perfect his title than the company could make its selection before the filing of the plat of survey.

It would certainly be inequitable to deprive him of his home on the theory suggested, even if it were proven, as it is not, that the tract had not been surveyed with all convenient speed.

Respectfully submitted.

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